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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Marc H. Blasser

Serial No. 75/371,632

Arthur G. Yeager for Marc H. Blasser

Margery A. Tierney, Trademark Examining Attorney, Law Office
107 (Thomas Lamone, Managing Attorney)

Before Seeherman, Quinn and Bucher, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Marc H. Blasser has appealed from the final refusal of
the Trademark Examining Attorney to register the rhino design,
shown below, for "urological and erectile dysfunction clinical
services."¹



¹ Application Serial No. 75/371,632, filed October 10, 1997,
asserting first use and first use in commerce in October 1993. The
application is also for "golf balls" in Class 28, but the refusal of
registration applies only to the Class 42 services. Applicant has
referred to its mark as a "shield and rhino design" in its

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the rhinoceros design, shown below, and registered for "pharmaceuticals used to treat sexual dysfunction or to maintain male or female sexual health"² as to be likely to cause confusion or mistake or to deceive. The mark is described in the application as "a rhinoceros in a circle and the design will be used facing in either direction."



The appeal has been fully briefed, but an oral hearing was not requested.

We affirm the refusal of registration.

Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between

application; for ease of reference, we have used the term "rhino design" in our opinion.

² Registration No. 2,121,170, issued December 16, 1997.

the goods and/or services. **Federated Food, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the marks, we find that they are very similar in appearance. Both are designs of rhinoceroses. Applicant goes to great length to detail the specific differences in the marks, for example, by describing the cited mark as "a modern caricature of only the head and neck portion of a flat-bottomed jawed head with an inverted cone above a stylized eye and with the large horn being sculpted to provide a very large base with excessive recurve merging into a circular border, likewise the neck merges into that same border." Brief, p. 4. However, consumers are unlikely to make such a detailed analysis of the designs, and thereby note the various differences in the marks. Under actual marketing conditions consumers do not have the luxury to make side-by-side comparisons between marks, and instead they must rely on hazy past recollections. **Dassler KG v. Roller Derby Skate Corporation**, 206 USPQ 255 (TTAB 1980). As a result, consumers are likely to remember the marks as being similar, namely, the design of a rhinoceros. To the extent that they would remember that applicant's mark depicts the full body of a rhinoceros on a rectangle background, while the registered mark shows only the head on a circle background, they are likely to think that the marks are variants of each other,

rather than that they represent different sources of the goods and services.

The marks also have the same connotation, namely, that of a rhinoceros. Further, although design marks are not normally articulated, if consumers were to refer to them, they would describe both as rhinoceros designs, whether the design is a full view or merely the head.

Accordingly, when considered in their entirety, we find that the marks are very similar, and convey similar commercial impressions, a factor that weighs heavily in favor of a finding of likelihood of confusion.

Moreover, the cited mark must be considered a strong mark. Another duPont factor is "the number and nature of similar marks in use on similar goods." Although applicant has submitted a number of third-party registrations for marks containing rhinoceros designs, none of these registrations is for goods or services similar to those of the applicant or registrant. Specifically, five of the registrations are for clothing, while the others are for heat protective apparel, beer, breeding of animals, custom manufacture of shopping containers, and commercial offset printing. Thus, this factor too weighs in favor of a finding of likelihood of confusion.

Turning to the respective goods and services, the cited registration includes "pharmaceuticals used to treat sexual

dysfunction," and applicant's erectile dysfunction clinical services must be considered a type of sexual dysfunction. As a result, there is no question that applicant's services and the registrant's goods are used for the same narrow purpose, i.e., the treatment of erectile dysfunction. Further, they would appeal to the same class of consumers, namely, people with erectile dysfunction.

Applicant argues that drug companies do not practice medicine, but goes on to state that "if a doctor is under contract to perform clinical trials of a drug company³ and seeks permission to use that drug company's mark in connection with such trials, the public would correctly assume some association between them." Brief, p. 5. Applicant asserts that in his case no association would be found because of the differences in the marks and in the goods and services.

We are not persuaded by applicant's argument. As indicated above, we find the marks to be very similar. Further, although applicant renders services, and the cited

³ The Examining Attorney has submitted a story from the NEXIS data base discussing doctors' performing clinical trials of drugs. Applicant has objected to this article because it was written one year after the filing of the application, and over two years after applicant's first use of his mark. Applicant's objection is not well taken. The article was properly made of record during the examination of the application, and is relevant to our assessment of likelihood of confusion, which is determined as of the time of appeal, not as of an applicant's first use of its mark or the filing of its application.

registration is for drugs, we find the services and drugs to be sufficiently related that, if a similar mark were used for both, confusion would be likely to occur. It is well established that it is not necessary that the goods or services of the parties be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods or services of the parties are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods or services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See **In re International Telephone & Telegraph Corp.**, 197 USPQ 910 (TTAB 1978).

In this case, the fact that both applicant's services and the registrant's goods are used for the same, limited purpose, and would be used by the same class of consumers, is sufficient to demonstrate that relationship, such that this factor weighs in favor of a finding of likelihood of confusion.

We recognize that the channels of trade for applicant's services and the registrant's goods are different. However, a doctor or clinic providing erectile dysfunction clinical

services may suggest a pharmaceutical product, such as the registrant's, to treat sexual dysfunction. Or a patient of such a clinic may encounter over-the-counter pharmaceutical products for sexual dysfunction in a drugstore,⁴ or may be exposed to such prescription drugs through advertising. It is common knowledge that pharmaceutical companies advertise prescription drugs directly to the ultimate consumer through television and newspaper ads.

Thus, although there are specific differences in the channels of trade, patients are likely to encounter both applicant's services and the registrant's identified pharmaceuticals. Accordingly, this factor is at most neutral in the likelihood of confusion analysis.

Applicant also asserts that the customers for the respective services and goods are sophisticated. We agree that physicians would be both sophisticated and careful purchasers and because of that sophistication, are not necessarily likely to believe that clinical services and pharmaceuticals emanate from the same source, even if offered under similar marks. However, patients suffering from erectile dysfunction must also be considered consumers of the respective services and goods. Although we must assume that

⁴ The "pharmaceuticals" identified in the cited registration are not limited to prescription drugs.

they would be careful in their purchase of medical goods and services, they would not be sophisticated enough about medical practice to assume that pharmaceutical companies offering a drug for erectile dysfunction would not sponsor or operate a clinic treating such a problem, particularly when there has been publicity about physician's conducting clinical trials of pharmaceutical products. Because of this, and because of the similarity of the marks, even if the ultimate consumers were to exercise care in their purchase of the goods or services, they are likely to be confused. Thus, although in general the factor of care in making the purchase would favor an applicant, in this case it is, at the very best, neutral.

Finally, applicant argues that he is not aware of any instances of actual confusion as of the filing of his brief in June 1999. However, the registrant's claimed date of first use of its mark is December 1996. Not only is this time period very limited, but we do not have any information about the extent of either applicant's use and advertising, or the registrant's use and advertising, for us to conclude that there has been an opportunity for confusion to occur if it were likely to occur. In this connection, we note that applicant appears to render its services only in Orange Park, Florida, while the registrant is located in California. Thus,

we must count this factor as neutral in our determination of likelihood of confusion.

After weighing the various factors, as discussed above, we find that applicant's mark, used in connection with urological and erectile dysfunction clinical services, is likely to cause confusion with the registered mark for pharmaceuticals used to treat sexual dysfunction or to maintain male or female sexual health.

Decision: The refusal of registration is affirmed.

E. J. Seeherman

T. J. Quinn

D. E. Bucher

Administrative Trademark Judges
Trademark Trial and Appeal Board